BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELVIN PRINCE	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,057,204
	)	
GENERAL MOTORS LLC	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 1, 2011, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Joshua P. Perkins, of Kansas City, Missouri, appeared for claimant. Peter J. Chung, of Kansas City, Missouri, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found there was not a preponderance of evidence to show claimant provided timely notice of a repetitive injury for a date of accident of January 14, 2011. Accordingly, claimant's request for workers compensation benefits was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 26, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.[1]

ISSUES

Claimant requests review of the ALJ's finding that he did not give respondent timely notice of his repetitive injury for a date of accident of January 14, 2011. Claimant contends he provided work restrictions to respondent within five days of being diagnosed with carpal tunnel syndrome, which provided respondent with sufficient notice.

---

[1] The transcript of claimant's deposition taken October 19, 2011, is in the Division file but was not considered by the Board in this review because it was not stipulated into the record and there is no indication it was considered by the ALJ. Neither the Notice to Take Deposition nor the deposition transcript designate it as either an evidentiary deposition or a discovery deposition.

Respondent's brief was due on or before December 8, 2011. It was received on January 3, 2012. Therefore, it will not be considered.

The issue for the Board's review is: Did claimant give respondent timely notice of his repetitive accident?

FINDINGS OF FACT

Claimant has worked for respondent since June 2009. He worked on the assembly line, installing parts on cars. Claimant said he worked in several departments, and the work always involved repetitive use of his hands. He first worked in the trim department and then moved to lights and sensors. In both those departments he was required to use an air screw gun.

Claimant testified he noticed symptoms in his left hand and wrist about a year and a half ago. He reported his symptoms to a nurse in the medical department at respondent, telling the nurse he had some numbness, tingling and aching pain in his hand and wrist. Claimant did not tell the nurse the symptoms were from anything in particular. Claimant said the nurse entered his claim in a computer. Claimant did not remember when he spoke with the nurse in the medical department about the problems with his left hand and wrist. He said respondent did not provide him with any treatment nor was he provided with any documentation after he reported the symptoms to the nurse.

Claimant's attorney advised the ALJ that respondent had reported the date of claimant's injury to the Kansas Division of Workers Compensation as being January 14, 2011. But there was no evidence placed into the record at the preliminary hearing as to when this report was made. At the preliminary hearing, the parties appeared to have treated January 14, 2011, as the date of accident for the series, but there was no actual stipulation to that date for purposes of determining whether notice was timely.

Claimant acknowledged that in January 2010 he fell on ice in respondent's parking lot and injured his left arm, shoulder and thigh, as well as his neck. He did not injure his left wrist in that fall. Claimant is also on restrictions for his back related to a non-work-related car accident in which he was involved earlier this year.

Claimant has been seen by Dr. Jesse Cheng, respondent's company doctor, and by Dr. Prem Parmar, an orthopedic surgeon. He also had an EMG. He could not remember whether Dr. Cheng sent him to Dr. Parmar or who sent him for an EMG. The record contains a letter from Dr. Parmar to Dr. Cheng dated August 22, 2011, in which Dr. Parmar said claimant's chief complaint was left hand pain, numbness, tingling and some weakness that had been going on a year and a half and which he noticed at work while performing repetitive activities. Dr. Parmar noted that claimant had fallen approximately a year and a half earlier, injuring his left elbow, left shoulder and back but that he had noticed his hand and wrist problems before the fall. Dr. Parmar indicated an EMG showed

claimant had positive carpal compression on the left. He believed claimant had left carpal tunnel syndrome which was work related. He recommended left carpal tunnel release surgery.

The ALJ left the record in this matter open in an effort to pin down the date claimant reported his symptoms to respondent's medical department. On October 31, 2011, claimant's attorney forwarded to the ALJ a letter, with a copy emailed to respondent's attorney, that included a copy of a report of a nerve conduction study performed on claimant on January 14, 2011, which, according to Dr. Christina Lenk, revealed that claimant had left carpal tunnel syndrome of moderate severity.

Also attached to the October 31, 2011, letter from claimant's attorney to the ALJ were the progress notes from respondent's medical clinic. The progress notes start on May 7, 2010. From that date through July 1, 2010, it is clear the notes relate to claimant's fall in respondent's parking lot. The July 1, 2010, note indicates that claimant had been released by Dr. Drisko for regular work. The next entry was dated January 19, 2011, in which Margo Gambill, RN, noted that claimant had come to the clinic "with restrictions written by Waldo Rehabilitation Dr. Owens Light duty including minimal bending and twisting, as well as limited use of left arm for a period of 8 weeks after return to work."[2] Another entry of that date by RN Gambill indicates: "Secondary Cause Description: Fall (Parking Lot)."[3]

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice

[2] Correspondence from claimant's attorney to ALJ Hursh with attachment, filed October 31, 2011.

[3] *Id.*

> unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2010 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[5]

---

[4] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[5] K.S.A. 2010 Supp. 44-555c(k).

ANALYSIS

Generally, an analysis of an issue concerning the timeliness of notice given by claimant to respondent for a repetitive trauma injury begins with a determination of the statutory date of accident. This determination is made by comparing the triggering events listed in K.S.A. 2010 Supp. 44-508(d) with the facts of the case. In this case, such an analysis is necessary because the claimant alleged a series of accidents ending January 14, 2011.

At the preliminary hearing, counsel for claimant offered to stipulate to January 14, 2011, as the date of accident for the series. Fortunately for claimant, respondent declined that offer.

> THE COURT: Okay. I take it you guys are stipulating to an accident date of January 14, '11; is that right?
>
> MR. PERKINS [claimant's attorney]: Yes, I would stipulate to that, Your Honor.
>
> MR. CHUNG [respondent's attorney]: I don't have anything to refute the date that Josh has given, Your Honor.
>
> THE COURT: Okay.
>
> MR. CHUNG: But as a series, I'm not sure if there's anything that triggered it under the old law, to be honest with you.[6]
>
> . . . .
>
> MR. PERKINS: And I guess the–the accident date, I could possibly change depending on what Pete provides us as well.
>
> MR. CHUNG: Correct.
>
> THE COURT: Yeah. If you happen to come to some kind of an agreement in the meantime, let me know that as well.
>
> MR. PERKINS: Right.
>
> MR. CHUNG: Sure.[7]

---

[6] P.H. Trans. at 20-21.

[7] *Id.* at 23.

Claimant testified he gave oral notice of his left wrist condition in January 2011 and, thereafter, presented the respondent's company nurse with work restrictions that were given to him by a physician for that injury. These restrictions were not from an authorized physician. K.S.A. 2010 Supp. 44-508(d) defines the date of accident as "the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition." As the ALJ noted in his Order, contrary to claimant's testimony, the plant medical records do not show that claimant made complaints to the plant nurse about having "numbness, tingling and aching pain in [his] wrist and [his] hand"[8] or forearm. Rather, the chart entry for January 19, 2011, only mentions the left arm with the "Secondary Cause Description: FALL (PARKING LOT)"[9] There is no mention of a series of accidents, a repetitive trauma injury, or carpal tunnel syndrome. Accordingly, this Board Member agrees with the ALJ that claimant failed to prove he gave notice on January 19, 2011. However, the analysis does not end there because there was no triggering event to support a finding of a January 14, 2011, date of accident.

Pursuant to K.S.A. 2010 Supp. 44-508(d), the date of accident is the date the authorized physician, Dr. Parmar, diagnosed claimant's carpal tunnel syndrome condition as work related and that fact was communicated in writing to claimant. As that date was no earlier than when respondent received the letter dated August 22, 2011, by Dr. Parmar, notice would be timely. Furthermore, claimant filed his Application for Hearing with the Division on August 16, 2011.

CONCLUSION

The date of accident is no sooner than the date respondent received claimant's Application for Hearing or the date Dr. Cheng received the August 22, 2011, letter by Dr. Parmar, whichever occurred first. Using either date, claimant gave respondent notice of accident within 10 days of the date of accident for the series of accidents.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated November 1, 2011, is reversed and remanded to the ALJ for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

---

[8] *Id.* at 18.

[9] Correspondence from claimant's attorney to ALJ filed with the Division Oct. 31, 2011, attached Case Clinic Notes–General Motors Medical.

Dated this _____ day of January, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Joshua P. Perkins, Attorney for Claimant
Peter J. Chung, Attorney for the Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge